No. 91-5397

In the Supreme Court of the United States

OCTOBER TERM, 1991

EMERY L. NEGONSOTT, PETITIONER

v.

HAROLD SAMUELS, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 18 U.S.C. 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for an offense, committed on an Indian reservation, that would otherwise be within exclusive federal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Emery Negonsott is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian Tribe. In 1985, he was arrested by the Brown County Sheriff, a state law enforcement official, in connection with the shooting of another Indian on the Kickapoo Reservation. Petitioner was subsequently convicted in Kansas state court of aggravated battery. The Supreme Court of Kansas affirmed, holding that the State had criminal jurisdiction over the offense. *State* v. *Nioce*, 716 P.2d 585 (Kan. 1986) (Pet. App. 21-34).

2. Petitioner then filed the present habeas corpus action in the United States District Court for the District of Kansas, seeking a writ of habeas corpus. He claimed that 18 U.S.C. 3243, which grants the State of Kansas criminal jurisdiction over crimes by or against Indians committed on Indian reservations in Kansas, does not extend to aggravated battery. In petitioner's view, that crime, by virtue of being encompassed by the Major Crimes Act, 18 U.S.C. 1153, remains subject to exclusive federal jurisdiction.

The district court rejected petitioner's claim. In the court's view, 18 U.S.C. 3243 grants Kansas jurisdiction concurrent to that of the United States with respect to all crimes, even those covered by the Major Crimes Act. Pet. App. 35-43. The Court of Appeals for the Tenth Circuit affirmed on the same ground. *Negonsott* v. *Samuels*, 933 F.2d 818 (1991) (Pet. App. 44-64). This petition for certiorari, in which respondent has acquiesced, followed.

DISCUSSION

In our view, the court of appeals' holding is clearly correct. The pertinent federal statute—18 U.S.C. 3243—confers criminal jurisdiction on the State of Kansas to prosecute Indians for aggravated battery and other major crimes committed on Indian reservations in Kansas. The Eighth Circuit, however, has reached the contrary conclusion under a virtually identical statute that confers criminal jurisdiction on the State of Iowa over the Sac and Fox Indian Reservation in that State. A third identically worded statute confers criminal jurisdiction on North Dakota over the Devils Lake Sioux Reservation. Resolution of the basic question in this case—whether federal jurisdiction over such crimes is exclusive or whether the States enjoy concurrent jurisdiction—is of considerable practical importance to both state and federal law enforcement authorities in those States. In view of its importance, and because the Eighth and Tenth Circuits have reached conflicting conclusions on the question, we agree with both petitioner and respondent that review is warranted.[1]

1. a. The generally applicable framework governing criminal jurisdiction on Indian reservations is well established. Under 18 U.S.C. 1152, crimes committed by or against Indians in Indian country are subject to federal jurisdiction. However, the second paragraph of Section 1152 expressly excludes offenses committed by one Indian against the person or property of another.[2] Such offenses between Indians are typically subject to the exclusive jurisdiction of the Tribe concerned, except for offenses covered by the Major Crimes Act, 18 U.S.C. 1153. The latter offenses are subject to federal as well as tribal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990).

This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. 1153 (the Major Crimes Act) is exclu-

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[1] Since filing his petition for a writ of habeas corpus, petitioner has been released from custody and his sentence has been discharged. The petition is not moot, however, because petitioner was in custody when the petition was filed and he continues to suffer collateral consequences from his conviction. *Carafas* v. *LaVallee*, 391 U.S. 234, 237-238 (1968); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (collateral consequences include possible use of conviction to impeach future testimony and to prosecute petitioner as multiple offender).

[2] Offenses committed by one non-Indian against another non-Indian are implicitly excluded from 18 U.S.C. 1152 under *United States* v. *McBratney*, 104 U.S. 621 (1882). Those offenses are instead subject to state jurisdiction.

sive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978); see also *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962). The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. 1152 likewise is exclusive of state jurisdiction. *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Williams* v. *Lee*, 358 U.S. 217, 220 (1959); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979). A number of state courts have likewise so held. See *State* v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arquette* v. *Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 320 P.2d 697 (Ariz. 1958); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Warner*, 379 P.2d 66, 68-69 (N.M 1963) (dictum); *State* v. *Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).[3]

Congress may, of course, alter these jurisdictional arrangements. Indeed, Congress has done so. Public Law 280 is the most familiar example. That statute automatically conferred on certain States jurisdiction over offenses involving Indians in Indian country. The statute also authorized other States to assume such jurisdiction. See *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 471-474.

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[3] In our amicus brief urging denial of the petition for certiorari in *Arizona* v. *Flint*, 492 U.S. 911 (1989), we took the position that federal jurisdiction under 18 U.S.C. 1152 is exclusive. We relied, *inter alia*, on the decisions cited in the text; Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588) and its legislative history; and the background of special statutes (including 18 U.S.C. 3243, at issue in this case) that confer criminal jurisdiction on particular States.

Prior to Public Law 280's enactment, Congress passed a series of special statutes granting particular States jurisdiction over some or all Indian country within their respective borders. This case involves one such statute, 18 U.S.C. 3243. Enacted in 1940, the statute confers plenary criminal jurisdiction on the State of Kansas over the four Indian reservations within its borders. Act of June 8, 1940, ch. 276, 54 Stat. 249. We turn now to examine that statute.

b. Section 3243 provides in full:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The language of the first sentence of Section 3243 unambiguously confers criminal jurisdiction on Kansas over *all* offenses (as defined by state law) committed by or against Indians on Indian reservations, whether or not the offenses are otherwise subject to 18 U.S.C. 1152 or 1153 or to the jurisdiction of the tribe concerned. See Pet. App. 50-51.

Petitioner does not dispute that the first sentence of 18 U.S.C. 3243, standing alone, subjects him to state jurisdiction. He contends (Pet. 7-8), however, that insofar as his offense is concerned, the jurisdiction granted by the first sentence is taken away by the second. The second sentence preserves federal court jurisdiction "over offenses defined by the laws of the

United States committed by or against Indians on Indian reservations." Petitioner argues that because the Major Crimes Act includes the crime (aggravated battery) of which he was convicted [4]—and that because federal jurisdiction under that Act ordinarily is exclusive—the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Major Crimes Act. In petitioner's view, the first sentence of Section 3243 can be read according to its plain meaning only if Congress impliedly "repealed" the Major Crimes Act. See Pet. 19-20. Petitioner is wrong; he misapprehends the import of both 18 U.S.C. 3243 and the Major Crimes Act.

The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians in Kansas, that was precisely the purpose of the first sentence of Section 3243. The second sentence did no more than preserve the subject matter jurisdiction of federal courts over crimes defined by federal law. It does not suggest that this jurisdiction, as so pre-

[4] The Major Crimes Act does not specifically mention battery, aggravated or otherwise. It does, however, include among the listed offenses "assault to commit murder, assault with a dangerous weapon, [and] assault resulting in serious bodily injury." 18 U.S.C. 1153. The Kansas statute that petitioner was convicted of violating defines aggravated battery, in part, as "the unlawful touching or application of force" to another person "which either (a) [i]nflicts great bodily harm upon him; or * * * (c) [i]s done with a deadly weapon, or in any manner whereby great bodily harm * ** can be inflicted." Kan. Stat. Ann. § 21-3414 (1991).

served, is exclusive of state jurisdiction. Recognition of jurisdiction in the state courts over crimes under *state* law does not "deprive" the "courts of the United States" of their "jurisdiction" over "offenses defined by the laws of the United States." [5]

Moreover, a construction of the second sentence of Section 3243 that rendered federal jurisdiction exclusive wherever conduct is made criminal by federal law would conflict with the first sentence's unqualified grant of jurisdiction to Kansas. In contrast, construing the second sentence to preserve *concurrent* federal authority over the same general subject matter best comports with the canon of construction that full effect be given to all of the statute's language, see *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979)—a familiar canon that this Court has applied to statutes affecting Indians. See *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 239 (1985).

Nor does this interpretation work an "implied repeal" of the Major Crimes Act. In the first place, there is nothing "implied" about the effect of 18 U.S.C. 3243 in this setting; state jurisdiction follows from the express terms of the first sentence of Section 3243. Moreover, it is not the Major Crimes Act that precludes the exercise of state jurisdiction over conduct by Indians that constitutes a federal crime under that Act. The preclusion flows, instead, from the general principle that States have no inherent jurisdiction over Indians in Indian country, *United States* v. *John*, 437 U.S. at 651-653; *Fisher* v. *District*

[5] Indeed, the subject matter jurisdiction of the federal courts over federal prosecutions under the Major Crimes Act or 18 U.S.C. 1152 remains *exclusive* under 18 U.S.C. 3231.

Court, 424 U.S. 382 (1976), and may exercise such jurisdiction only where (as here) there is a clear grant of authority by Congress. *Williams* v. *Lee*, 358 U.S. at 221 ("when Congress has wished the States to exercise [criminal and civil adjudicatory jurisdiction] it has expressly granted [it to] them"); *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).[6] By virtue of that settled principle, Kansas would have been without jurisdiction (prior to enactment of 18 U.S.C. 3243) to prosecute an Indian for a major crime committed on an Indian reservation within its borders even if hte Major Crimes Act had never been enacted. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867).

Finally, just as jurisdiction under the Major Crimes Act ordinarily is exclusive of state jurisdiction, federal jurisdiction under 18 U.S.C. 1152 over other crimes committed by or against Indians in Indian country is also exclusive. See p. 4, *supra*. Accordingly, under petitioner's view (that the second sentence of Section 3243 renders federal jurisdiction exclusive wherever it exists), the first sentence would actually confer jurisdiction on Kansas only over those offenses that are not also crimes defined by federal law.[7] In other words, Section 3243 would confer no

[6] Congress enacted Section 3243 specifically to grant Kansas some measure of criminal jurisdiction. The question is whether that grant includes major crimes as defined by federal law. That issue is quite different from the question in *United States* v. *John*, *supra*, where the State was not acting pursuant to a congressional grant of criminal jurisdiction.

[7] Under petitioner's view, the only offenses over which the State obtained jurisdiction under 18 U.S.C. 3243 would be those non-major crimes that are committed by one Indian against another (which, by virtue of the second paragraph of 18 U.S.C. 1152, are ordinarily subject to the exclusive jurisdiction of the tribe concerned)—and, perhaps, those offenses defined by state law and assimilated into federal law by 18 U.S.C. 1152 and the Assimilative Crimes Act, 18 U.S.C. 13. The Tenth Circuit has held that assimilated state crimes are not "offenses defined by the laws of the United States" within the meaning of the proviso to 18 U.S.C. 3243. See *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d 1434, 1439-1440 & n.3 (10th Cir. 1986); cf. *United States* v. *Bear*, 932 F.2d 1279, 1281 (9th Cir. 1990). Under that view, state jurisdiction over such offenses is exclusive, and the second sentence of Section 3243 preserves concurrent federal jurisdiction under 18 U.S.C. 1152 only over offenses that are independently defined by federal law.

concurrent jurisdiction at all. That view is contrary to the explicit text of the Act.

c. As shown above, Section 3243 by its terms confers complete criminal jurisdiction on Kansas. We therefore would not ordinarily find it necessary to discuss, much less rely on, the statute's legislative history. See *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). However, because petitioner argues that Section 3243's legislative history supports his interpretation of the statute, we think it is appropriate to respond.

In our view, the legislative history of Section 3243 clearly confirms that Congress intended to establish a regime of concurrent jurisdiction, not to preserve exclusive federal jurisdiction over conduct made criminal by federal law. The history shows this: (a) prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes committed by or against Indians, regardless of whether they were otherwise subject to federal jurisdiction; (b) the Indians in Kansas did not object to

this regime, and in fact sought enactment of Section 3243 to clarify the legality of the State's exercise of jurisdiction; and (c) Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes (as defined by state law) by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. See H.R. Rep. No. 1999, 76th Cong., 3d Sess. (1940) (House Report); S. Rep. No. 1523, 76th Cong., 3d Sess. (1940) (Senate Report).

Both the House and Senate Reports consist almost exclusively of a letter and memorandum from Acting Secretary of the Interior Burlew commenting on the proposal to confer jurisdiction on Kansas and the original version of the bill intended to accomplish that result. The Acting Secretary offered an alternative version of the bill that took account of views he expressed in the letter and memorandum, and it was this version that Congress enacted into law as Section 3243. Thus, the views of the Acting Secretary, who headed the agency responsible for administering Indian Affairs, are of considerable relevance in construing Section 3243, *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), especially since the responsible congressional committees adopted his views and proposal in their reports.

The letter and memorandum explain that Kansas then exercised jurisdiction over all crimes by or against Indians. The Acting Secretary expressed the view that without the exercise of jurisdiction by the State, law enforcement on Indian reservations in Kansas would have been inadequate, because existing federal criminal statutes "le[ft] some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts," and because "[i]n the case of the four Kansas reservations * * * no tribal

courts [had] existed for many years." House Report at 2; Senate Report at 2. As a practical matter, therefore, "offenses committed on these reservations and involving Indians have been prosecuted in the State courts, *even where the criminal act charged constituted one of the major offenses listed in* [*the Major Crimes Act*]." House Report at 4 (emphasis added); Senate Report at 3 (emphasis added).

The bill was proposed because questions had been raised about "the authority of the State courts to proceed in these cases," House Report at 4; Senate Report at 3, and the legislative history makes clear that it was intended to ratify the then-existing regime of *de facto* state jurisdiction. Indeed, according to the Acting Secretary, the Indians themselves "[did] not desire reestablishment of the tribal courts, but * * * expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." *Ibid.*[8] Inasmuch as the State had exercised jurisdiction over *all* offenses, including those defined as major crimes under federal law, both the Executive and the Legislative Branches plainly understood that the bill would confer jurisdiction over all offenses defined by Kansas law, whether or not those offenses were subject to federal jurisdiction as well. The Acting Secretary of the Interior made this point explicitly: "In short, the

[8] The Acting Secretary further noted that state prosecutions—even for major crimes—"were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." House Report at 4; Senate Report at 3. Hence, the construction we urge is not in tension with the canon requiring liberal construction of statutes in favor of Indians. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. at 392; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 79 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

enactment of [Section 3243] will merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years." House Report at 5; Senate Report at 4.

Petitioner contends that an amendment of the bill demonstrates that Congress intended that federal jurisdiction over offenses covered by the Major Crimes Act would be exclusive. As originally proposed, the bill provided for "relinquish[ment]" of "concurrent jurisdiction" to Kansas, and specifically stated that the Major Crimes Act, 18 U.S.C. 548 (1934)—as well as 25 U.S.C. 217 and 218 (1934), the predecessors of 18 U.S.C. 1152—would be "modified accordingly." See 86 Cong. Rec. 5596 (1940). Subsequently, each House adopted a substitute version that contained substantial revisions, including deletion of both the reference to "concurrent" jurisdiction and the explicit modification of the Major Crimes Act. In light of those revisions, petitioner argues that Section 3243, as enacted, must be construed as *not* conferring concurrent jurisdiction and as *not* modifying the exclusive aspect of federal jurisdiction under the Major Crimes Act. Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Rather than buttressing petitioner's position, however, the amendment supports our reading of Section 3243. Petitioner fails to point out that the substitute version was proposed by the Acting Secretary in order to express more accurately the legal situation as it then existed and as it was "intended to be created." House Report at 3; Senate Report at 2. In particular, because federal courts apparently had exercised jurisdiction only over major crimes, the Acting Secretary thought that it was inaccurate to describe the bill as generally "relinquishing" "concurrent" jurisdiction to Kansas; rather, in his view, it conferred complete criminal jurisdiction on the State, whether or not the federal government would also have jurisdiction over the particular offense. He explained:

> The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby *to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law.* However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, *but a case of conferring upon the State complete jurisdiction*, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

House Report at 3 (emphasis added); accord, Senate Report at 2. The substitute bill the Acting Secretary proposed (and Congress enacted) was intended to make clear that Section 3243 would confer *more* than whatever jurisdiction happened to be concurrent with that of the United States, not to narrow its scope. See Pet. App. 60-61; *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1439-1440. As the court of appeals correctly noted, the "decision to excise the word 'concurrent' * * * was to clarify rather than to change [the] substance" of what is now 18 U.S.C. 3243. Pet. App. 61.[9]

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[9] The Acting Secretary did not explain why his substitute lacked a provision stating that the Major Crimes Act and what is now 18 U.S.C. 1152 were "modified accordingly." At least two explanations are possible. First, because the sub-

The Acting Secretary's explanation also makes plain that the intent was only to ensure that "prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." House Report at 5; Senate Report at 4. The obvious corollary was that the State would have jurisdiction in *all* cases.

Finally, petitioner seeks support for his view in a letter from Representative Lambertson of Kansas to the House Committee on Indian Affairs recommending enactment of the proposed bill. See House Report at 1-2. In that letter, Representative Lambertson noted that "[t]he Government here relinquishes to the State full jurisdiction over the Indians

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stitu[illegible] version made clear that the State would have complete jurisdiction and that the United States would retain whatever jurisdiction it then had over offenses committed by or against Indians (under the Major Crimes Act or what is now 18 U.S.C. 1152), there was no need to reiterate what the effect on the latter statutory provisions would be. See Pet. App. 61 ("Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead."). Second, the "exclusive" nature of federal jurisdiction over offenses covered by the Major Crimes Act and what is now 18 U.S.C. 1152 derived not from those provisions standing alone, but from more general principles of Indian law that rendered state law inapplicable to matters involving Indians in Indian country. The express conferral of criminal jurisdiction on Kansas in the first sentence of Section 3243 was sufficient to displace those general principles of preemption, and there accordingly was no need to "modify" the Major Crimes Act or the predecessors of 18 U.S.C. 1152. In any event, any negative inference that might be drawn from the mere absence of an "express" modification provision is wholly insufficient to overcome the clear import of the all-encompassing statutory text and the legislative history.

for small offenses." *Id.* at 2. The negative implication, petitioner argues, is that Congress intended to confer *no* jurisdiction over crimes included in the Major Crimes Act. This is baseless. If anything, the fact that Representative Lambertson understood Congress to "relinquish" to Kansas "full" jurisdiction over "small" offenses—with the implication that there would be no federal jurisdiction over those offenses—suggests that he believed the State would acquire only partial (*i.e.*, concurrent) jurisdiction over major crimes. See Pet. App. 57-58.[10]

2. Eight years after enacting Section 3243, Congress granted the State of Iowa criminal jurisdiction over crimes committed by or against Indians on the Sac and Fox Indian Reservation in Iowa. See Act of June 30, 1948, ch. 759, 62 Stat. 1161. The Iowa Act is identical to Section 3243 in all relevant respects,[11]

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[10] In stating that Kansas acquired "full" jurisdiction over "small offenses," Representative Lambertson may have been referring to non-major crimes committed by one Indian against another. Because such crimes are excluded from federal jurisdiction under 18 U.S.C. 1152 by the second paragraph of that provision—and because the tribes concerned did not have tribal courts that could exercise jurisdiction over such crimes—Kansas acquired "full" jurisdiction over those crimes under Section 3243.

[11] The Iowa Act provides:

> [J]urisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however*, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws

and it was expressly patterned after Section 3243. See H.R. Rep. No. 2356, 80th Cong., 2d Sess. 3 (1948). We therefore see no reason why the identical language in the Iowa Act and Section 3243 should be interpreted differently. The Eighth Circuit has concluded, however, that the proviso to the Iowa Act preserves exclusive federal jurisdiction over offenses covered by the Major Crimes Act. See *Youngbear* v. *Brewer*, 549 F.2d 74 (8th Cir. 1977). In interpreting the Iowa Act, the Eighth Circuit, adopting the analysis of the district court in that case, relied on the legislative history of Section 3243, which it believed (largely for the reasons urged by petitioner here) supported a finding of exclusive federal jurisdiction over major crimes. See 549 F.2d at 76; *Youngbear* v. *Brewer*, 415 F. Supp. 807, 812-813 (N.D. Iowa 1976).[12] As we have explained, that reading of Section 3243's legislative history is erroneous.

The interpretation of yet a third criminal statute is implicated here as well. In 1946, Congress extended to the State of North Dakota jurisdiction over crimes committed on the Devils Lake Sioux Reservation in language identical in all relevant respects to

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of the United States committed by or against Indians on Indian reservations.

62 Stat. 1161.

[12] The Iowa Supreme Court recently adopted the Eighth Circuit's interpretation of the Iowa Act. See *State* v. *Bear*, 452 N.W.2d 430 (Iowa 1990). That court originally took the view that the Iowa Act gave Iowa *exclusive* jurisdiction over non-major crimes, and *concurrent* jurisdiction over major crimes. See *State* v. *Youngbear*, 229 N.W.2d 728 (Iowa), cert. denied, 423 U.S. 1018 (1975). "Upon reexamination of the applicable statutes," however, the Iowa Supreme Court decided that the Eighth Circuit's *Youngbear* interpretation of the Iowa Act is correct. *State* v. *Bear*, 452 N.W.2d at 433.

that of Section 3243 (and the Iowa Act). See Act of May 31, 1946, ch. 279, 60 Stat. 229; S. Rep. No. 997, 79th Cong., 2d Sess. 2 (1946); H.R. Rep. No. 2032, 79th Cong., 2d Sess. 2 (1946). Application of the North Dakota Act to crimes otherwise within exclusive federal jurisdiction has not yet been definitively determined by any court, state or federal. See *State* v. *Hook*, 476 N.W.2d 565, 571 n.6 (N.D. 1991) (reserving the question of state jurisdiction over major crimes). If the question were raised in federal court, the Eighth Circuit's *Youngbear* holding with respect to the Iowa Act presumably would control the interpretation of the North Dakota Act, although the state courts of North Dakota would be free to disagree. Compare *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984) (certiorari granted because federal and state courts rendered conflicting interpretations of a statute affecting state and federal criminal jurisdiction over the Cheyenne River Sioux Reservation in South Dakota.)[13]

The very existence of separate statutes conferring jurisdiction on particular States over Indian reserva-

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[13] Respondent cites two additional federal statutes granting criminal jurisdiction to New York and California that are similar to the Kansas Act. See Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (California); Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. 232 (New York). The California Act is no longer in force; in 1953, Public Law 280 granted California complete criminal jurisdiction over all Indian country located within its borders. See 18 U.S.C. 1162. Moreover, both the California and New York Acts differ in one significant respect from those granting jurisdiction to Kansas, Iowa and North Dakota: they lack a proviso expressly preserving federal jurisdiction. The Second Circuit nonetheless has held that the United States retains concurrent criminal jurisdiction over Indian reservations in New York. *United States* v. *Cook*, 922 F.2d 1026, 1032-1033 (2d Cir.), cert. denied, 111 S. Ct. 2235 (1991).

tions within their borders indicates that this is not an area in which congressional policy requires a uniform nationwide rule. Accordingly, the fact that the Eighth and Tenth Circuits have reached different results under statutes conferring criminal jurisdiction on different States does not in itself mean that the Court is presented with the sort of circuit conflict that warrants review.

We nonetheless agree with petitioner and respondent that review is warranted. The Iowa Act is identical to and was explicitly patterned after the Kansas Act; the Eighth Circuit in *Youngbear* relied on the legislative history of the latter in construing the former; and the Tenth Circuit below in turn disagreed with the Eighth Circuit's reasoning in *Youngbear*. This case therefore presents a square conflict regarding the interpretation of identical statutory text.

Moreover, resolution of the issue of statutory construction is a matter of some importance. The differing interpretations of identical statutory language create doubts concerning the jurisdiction of three States over crimes committed by or against Indians on reservations within their borders. Law enforcement responsibilities of federal authorities within those States is correspondingly uncertain. Affirmance of the Tenth Circuit's judgment by this Court—which we believe is the proper disposition—would necessarily repudiate the Eighth Circuit's holding in *Youngbear*. The result would be to restore to Iowa the jurisdiction that Congress plainly intended it to enjoy, and to remove any doubts about North Dakota's jurisdiction. If, however, we are wrong on the merits (and if federal authorities therefore have exclusive responsibility for prosecuting major and other crimes involving Indians on the affected reservations in all three States), that responsibility should be made

clear, so that federal and state authorities may allocate their investigative and prosecutorial resources accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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